Supreme Court, U.S.
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No. 05-1275

IN THE

Supreme Court of the United States

HOLOCAUST SURVIVORS FOUNDATION USA, INC., *ET AL.*,

Petitioners,

v.

UNION BANK OF SWITZERLAND, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Dated: June 8, 2006

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ARGUMENT

1. In their Supplemental BIO, Respondents reiterate their claim that the challenge to the need-based allocation was decided by the Second Circuit's 2001 decision, Pet. App. D, and seek to bolster it by arguing, without citation, that the Looted Assets Class allocation was challenged by a *pro se* appellant and rejected by the Second Circuit. Supp. BIO at 6.

The party to which Respondents seemingly refer is *pro se* appellant Abraham Friedman, who was appointed *pro bono* counsel by the Circuit Court in 2001. A simple review of his brief in the Second Circuit shows that no such claim was raised. Brief of Appellant Abraham Friedman in *Friedman v. Union Bank of Switzerland*, 2001 WL 34117786, at 5. Rather, he challenged the competence of the entity chosen to distribute *slave labor* funds. *Id.* And a review of Respondents' own brief in response to Mr. Friedman likewise shows that Respondents recognized he did not challenge the Looted Assets allocation in 2001. *See* Brief of Plaintiffs-Appellees in Response to Appellant Abraham Friedman in *Lenini v. Union Bank of Switzerland,* 2001 WL 34117783, July 9, 2001, at *1.

Indeed, in the Second Circuit, Respondents' counsel was specifically pressed at oral argument on his claim that the Looted Assets Class allocation had been argued and decided in the previous appeal in that court in 2001, and conceded that it had not.

2. In their Supplemental BIO, Respondents also reiterate the claim that Petitioners acceded to the need-based allocation scheme, citing out of context a variety of statements by Petitioners where they strive to satisfy, for the benefit of U.S. Survivors, the district court's need-based criteria. Supp. BIO at 2-5. What Respondents neglect to mention is that such efforts by Petitioners were targeted at interim measures going to the *timing* of initial distributions, and Petitioners never abandoned their basic claim that the ultimate allocations needed to provide equal benefit to all class members, not merely the

needy. *See, e.g.* Letter from Samuel J. Dubbin, Esquire to the Honorable Edward R. Korman, July 23, 2002 ("[O]ur interim 'plan' is not the permanent insurance-based plan we hope to institute at the time of the secondary distribution, but is necessary given the time delays resulting from claims processing problems, and would undoubtedly advance the purpose for which the allocation appeals were prosecuted and honor the basis on which they were withdrawn.") [JA 6571-74]; September 10, 2003 Motion for Immediate Interim Distribution of Swiss Settlement Proceeds (request for assistance for those in need was "without prejudice" to claim that U.S. Survivors entitled to share of Looted Assets class funds "that reflects their proportion to the entire class of Survivors or Nazi victims worldwide.") [JA 6871].

Furthermore, once the district court rejected Petitioners' equal-benefit arguments and persisted in a need-based allocation scheme, Pet. App. F3-F5, the fact that Petitioners sought to *satisfy* the criteria imposed by the district court (which was the subject of the April 29, 2004 hearing) in no way abandoned or waived the consistent claim that such criteria were nonetheless unlawful. That was Petitioners' position in the Second Circuit, as described in Petitioners' Reply in Support of the Petition for a Writ of Certiorari, at 5-6.

Finally, Respondents' citation, Supp. BIO at 5, to the need-based distribution of funds in *Rosner v. United States of America,* Case No. 01-1859-Seitz (S.D. Fla.), the "Hungarian Gold Train" case, is actually very instructive. In *Rosner*, the parties' agreement to distribute settlement funds according to need was expressly noticed to the class and members were given the chance to opt out with full knowledge that the less-needy among them would not receive any funds. *Rosner*, September 30, 2005 Final Order and Judgment, at 10. *Rosner* thus is an example of class-members *voluntarily* electing to donate their shares to charity for the needy, with those who disagreed opting out. It is thus the precise opposite of this case, where the class was led to believe they would receive

some recovery and then told their funds instead would go to charitable purposes only *after* the time for opting out had passed. The issue here is whether a court can *force* class-members to contribute their shares of a recovery to charity, not, as in *Rosner*, whether class members can *affirmatively elect*, with full information, to engage in such charity.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition and Reply, this Court should grant certiorari.

Respectfully submitted,

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